TAN YOOK TIAN & ANOR.

v.

THE DISTRICT FOREST OFFICER, ROMPIN, PAHANG & ORS.

HIGH COURT MALAYA, KUANTAN
IDRIS YUSOFF J
[ORIGINATING MOTION NO. 3 OF 1982]
15 JULY 1986

ADMINISTRATIVE LAW: *Certiorari - Whether ouster clause in the statute precludes application for a prerogative order - Whether an executive order amenable to an order of certiorari - Forest Enactment (FMS) 1934 - Section 39(ii).*

CIVIL PROCEDURE: *Application to strike out action - Rules of the High Court 1980 - Order 18 r. 19(1)(a), (d).*

In this case the applicants had by an originating motion applied for an order of *certiorari* to remove into the Court and quash the respondent's order of forfeiture to the Government of two bulldozers belonging to the applicants. The respondents subsequently filed an application by way of summons-in-chambers to strike out the motion on the grounds that:

(i) that the motion disclosed no reasonable cause of action and/or that it was otherwise an abuse of the process of the Court;

(ii) that in view of the ouster clause in s. 39(ii) of the Forest Enactment (FMS) 1934 ("the Enactment"), the Court had no jurisdiction to grant an order of *certiorari* and/or that the circumstances were such that the Court should not entertain the application.

Held:

[1] The drastic power to dismiss an action summarily was to be used cautiously and so long as there discloses some cause of action or raises some questions fit to be decided by the Court, the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

[2] The finality clause in the statute in the form incorporated in s. 39(ii) of the Enactment was not a bar for the High Court to issue an order of *certiorari* quashing the order or decision of an inferior Court or tribunal. Such power of the High Court extended to an executive order or decision if it suffered from jurisdictional error.

[3] In an action for an order of *certiorari* the argument that the Court should not interfere inasmuch as the respondents had acted in accordance with the law was premature in that the issue would be decided upon a consideration of all the grounds and merits of the substantive motion.

[Respondents' application dismissed with costs.]

Cases referred to:

Tractors (M) Bhd. v. Tio Chee Hing [1975] 2 MLJ 1
Mak Sik Kwong v. Minister of Home Affairs, Malaysia [1975] 2 MLJ 168
South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors. [1980] 2 MLJ 165
Re Gilmore's Application [1957] 1 All ER 796
Mohamed v. Commissioner of Lands and Mines, Trengganu & Anor. [1968] 1 MLJ 227
Council of Civil Service Unions & Ors. v. Minister for the Civil Service [1984] 3 All ER 935

Legislation referred to:
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)
Forest Enactment (FMS) 1934, s. 39(ii)
Industrial Relations Act 1967, s. 29(3)(a)
Rules of the High Court 1980, O. 1 r. 4(1), O. 18 r. 19, 19(1)(a), (d)

Other sources referred to:
Supreme Court Practice, Mallal's, 2nd Edn., p. 226
Laws of England, Halsburys, 4th Edn., Vol. 1, para. 80

For the applicants - P. Pathmanathan; M/s. Yusuf Lee Pathma & Marbeck
For the respondents - Wan Mohamed bin Wan Muda, State Legal Adviser, Pahang

JUDGMENT

Idris Yusoff J:

The respondents in Originating Motion No. 3 of 1982 filed an application by way of summons-in-chambers to strike out the said motion on the grounds

(a) that it discloses no reasonable cause of action and/or

(b) that it is other wise an abuse of the process of the Court and/or

(c) that under the Forest Enactment (FMS) 1934 and the law on Judicial Review the Court has no jurisdiction to grant the Order of *certiorari* and or

(d) that even if the Court has jurisdiction it should not in all the circumstances of this case entertain the said motion.

The summons was supported by the affidavit of the second respondent, the State Forest Officer Pahang, sworn on 19 October 1982 which amongst others, adopted his earlier affidavit sworn on 13 July 1981 and that of the first respondent, the District Forest Officer, Rompin, Pahang sworn on 11 July 1981 which affidavits were used to resist an interlocutory application in another proceedings.

The applicants after having obtained leave of the Court on 12 May 1982 commenced this proceedings on 24 May 1982 to apply for an order of *certiorari* to remove into this Court for the purpose of its being quashed:

(a) the Order made by the State Forest Officer, Pahang by letter dated 15 December 1980 that two bulldozers namely:

  (i) Komatsu Bulldozer bearing registration No. BBC 8564, Engine No. NH 220-01-171N-30076, Chasis No. D60A-21712;

  (ii) Caterpillar D6B Bulldozer bearing registration No. BAL 2659, Engine No. 37H479, Chasis No. 37H479;

belonging to the applicants be confiscated to the Government; and

(b) the Order of the Ruler-in-Council made on 11 March 1981 in confirming the order of the State Forest Officer, Pahang confiscating the said bulldozers.

In the statutory statement annexed thereto, the applicants advanced 6 grounds to substantiate their application for the reliefs sought.

The facts of the case appear to be that on 20 November 1980 at about 5.00 p.m. the first respondent was informed by one of his subordinates of a suspected commission of a forest offence within the Aur Forest Reserve, Rompin. Acting on such information the following day, the first respondent together with 5 of his officers, went to the scene to carry out investigations. The scene of the alleged offence was confirmed to be within the Aur Forest Reserve, Rompin where fresh bulldozer tracks were seen leading to the said area. His investigations revealed that 40 trees had been illegally felled, they were still lying around the area and some of them had already been cut and were ready to be taken out though there were no sign of the offender/s. The bulldozer tracks were traced to lead to the direction of Kampung Kedaik. Following those tracks, he found 2 bulldozers, a Komatsu D60A and a Caterpillar tractor D6B hidden in the bushes, off the laterite road and were not visible from the road. The said bulldozers had no registration numbers and were not attended to. He believed that both the bulldozers were used in the illegal felling of timbers in the Aur Forest Reserve and seized both of them. A police report was lodged by him the same day at Kuala Rompin Police Station. He then referred the matter to the second respondent who subsequently issued a notice inviting for any appeal from interested parties for consideration of the State Executive Council against taking possession of the bulldozers. The applicants through their solicitors, denied any involvement of both bulldozers in the alleged offence. They contended that the bulldozers were to be taken out from their concession area by their drivers but due to inclement weather, had to be left about 7 miles from their logging area. Upon their return to the said place on 21 November 1980 the drivers discovered that the said bulldozers were missing. The applicants were so informed and on 22 November 1980 the second applicant lodged a police report at Kuala Rompin Police Station.

Consequent upon the issue of the notice by second respondent, both applicants attended an enquiry on 4 February 1981 conducted by the second respondent (which enquiry was regarded as an appeal) wherein they gave their explanation of the matter. All the relevant records were subsequently sent to the State Secretary Pahang for decision of the Ruler-in-Council on the appeal. On 13 May 1981, the second respondent was informed by the State Secretary that the Ruler-in-Council had on 11 March 1981 confirmed the taking possession of both the bulldozers and had ordered the forfeiture thereof to the Government, the third respondent.

The grounds as set out in the summons-in-chambers can be classified as follows:

(i) that the motion discloses no reasonable cause of action and/or that it is otherwise an abuse of the process of the Court;

(ii) that in view of the ouster clause in s. 39(ii) of the Forest Enactment (FMS) 1934, the Court has no jurisdiction to grant an order of *certiorari* and/or that the circumstances are such that the Court should not entertain the application.

Ground (i)

This ground is being pursued pursuant to O. 18 r. 19(1)(a) and (d) of the Rules of the High Court 1980 and also under the inherent jurisdiction of the Court. Although the summons does not so state in a more cogent term, however from the line of submission I can safely infer that such are the intentions.

The learned State Legal Adviser for all the respondents relies on the affidavits of the first and second respondents and maintains that the steps taken by the respondents were in strict compliance with the procedure laid down in the Forest Enactment (FMS) 1934 and as such the applicants have no reasonable cause of action and their application is an abuse of the

process of the Court. Perhaps I should state en passant that an application seeking relief under O. 18 r. 19(1)(a) will have to be based on the statement of claim or defence as no evidence is admissible - see para. (2) and Mallal's *Supreme Court Practice* (2nd Edn.) at p. 226 says

> The application must be grounded on the contention that the statement of claim or defence discloses no reasonable cause of action even on the basis that all the averments therein have been proved.

It seems clear that reading O. 18 r. 19, its application is not without limitation as it confines only to pleading or to indorsement of any writ. The term "pleading" has negatively been defined in O. 1 r. 4(1) and is normally used to mean the written statements of facts on which a claim or an answer to a claim is based, and which are exchanged between the parties in an action begun by writ of summons, though for the purpose of this rule, an originating summons and a petition are deemed to be pleadings. To my mind, the circumstances of the instant case are such that they do not come within the contemplation of O. 18 r. 19 as the application was made by way of originating motion and thus the respondents cannot avail themselves of the said summary process.

Turning to the question of exercising its inherent jurisdiction, what is needed is for the Court to ensure that it is being judicially carried out. The jurisdiction will not be exercised except with great circumspection or unless it is perfectly clear that the action will not succeed, and where triable issues of fact and law are raised, the summary jurisdiction should not be invoked. It has been said in *Tractors (M) Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1, a decision of the Privy Council that "the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power". In my judgment, so long as there discloses some cause of action or raises some questions fit to be decided by the Court, the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

The applicants are contending that they have unlawfully and illegally been deprived of their properties by a process which has manifested gross injustice to them in that the State Forest Officer Pahang in making the said order had acted without or in excess of jurisdiction and/or had violated the rules of natural justice. Their interests in the said bulldozers are that they claim the first applicant to be the registered owner of the Komatsu bulldozer D60A and while both of them are the administrators of the estate of Wong Tuck Kong (deceased) which is alleged to own the Caterpillar bulldozer D6B.

I have gone through the substantive motion filed by the applicants and in view of the issues of fact and law raised therein, I do not consider that such a recourse tantamounts to an abuse of the process of the Court, hence the respondents' application on this ground fails. Perhaps I should also cite a passage in the judgment of Abdoolcader J (as he then was) in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168 @ 171 I -

> ... The question of cause of action does not arise at this stage on the hearing of the summons and will only do so when the grounds and merits of the substantive application are considered. ...

Ground (ii)

The learned State Legal Adviser refers to s. 39(ii) of the Forest Enactment (FMS) 1934 which says:

> The order of the Ruler-in-Council made on such appeal shall be final,

hence *certiorari* is not available to the applicants.

It is to be noted that the Forest Enactment was passed in 1934 and since then various judicial decisions both in the Malaysian and English Courts had shown that there had been a dramatic and a radical change in the scope of judicial review which change had been aptly described as an upsurge of judicial activism. That being the judicial inclination, it is not unusual to find in modern statutes that the ouster clause is drafted in a different, if not much clearer term than the one used in the above Enactment as for example s. 29(3)(a) of the Industrial Relations Act 1967 - even then it is still not completely free from judicial intervention if there exists jurisdictional defect - see *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 MLJ 165. In that case the Privy Council also held

> the provision that an award shall be 'final' might exclude appeals but it would not be enough to exclude *certiorari.*

See also *Re Gilmore's Application* [1957] 1 All ER 796 and *Mohamed v. Commissioner of Lands & Mines, Trengganu & Anor.* [1968] 1 MLJ 227 wherein the Federal Court agreed with what Denning LJ said in *Re Gilmore's Application* at p. 801-

> ... and on looking again into the old books I find it very well settled that the remedy by *certiorari* is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to *certiorari'*. It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made "final", *certiorari* can still issue for excess of jurisdiction or for error of law on the face of the record.

Accordingly, I hold that s. 39(ii) of the Forest Enactment (FMS) 1934 is not sufficient to exclude *certiorari.*

The learned State Legal Adviser further contends that since the order of *certiorari* is supervisory in nature, it is normally issued by the Court to bring up for examination the acts of bodies of inferior jurisdiction. He further argues that under the doctrine of separation of powers, the organs of Government is divided into three, namely the legislative, executive and judicial and each organ is not subordinate to one another. Hence the Ruler-in-Council in confirming the taking possession of the two bulldozers and their subsequent forfeiture to the third respondent was performing an administrative act, which act is not amenable to the supervisory jurisdiction of the Court.

Certiorari is one of the orders issued by the Court to control the actions of administrative bodies and it is invariably issued when the Court is satisfied that the said administrative bodies have acted in excess of their jurisdiction or there is an error of law apparent on the face of the record, more especially when there is a provision in the law making their "decision as final". Lord Roskill in *Council of Civil Service Unions & Ors. v. Minister for the Civil Service* [1984] 3 All ER 935 @ 953 says -

> ... Historically the use of the old prerogative writs of *certiorari,* prohibition and *mandamus* was designed to establish control by the Court of King's Bench over inferior Courts or tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government.

Halsbury's Laws of England, 4th Edn., Vol. I at para. 80 says-

> ... The ambit of *certiorari* and prohibition was not limited to the supervision of functions that would ordinarily be regarded as strictly judicial, and in the nineteenth century the writs came to be used to control the exercise of certain administrative functions by local and Central Government authorities which did not necessarily act under judicial forms.

There is again the decision of the Federal Court in *Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors., Chuah Han Mow v. Menteri Hal Ehwal Dalam Negeri & Ors., and Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors.* [1977] 2 MLJ 108 concerning the orders of detention under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The appellants were all subject to orders of detention made under s. 4(1) of the Emergency (public Order and Prevention of Crime) Ordinance 1969 ("Ordinance 5"), they made representations against the orders to the Advisory Board, but in none of them did the Board make recommendations thereon within three months of the detention orders, and yet thereafter His Majesty, acting on advice confirmed the detention orders. In their appeals against the dismissal of their applications for *habeas corpus,* Suffian LP at p. 109 says,

> As the continued detention after three months was illegal, should this Court then order the release of the appellants? Mr. Fong submitted not, because (1) ... and (2) because under s. 6(2) of Ordinance 5 the decision of the Yang di-Pertuan Agong is "final, and shall not be called in question in any Court." I am of the opinion however that section applies only to real decisions, not to *ultra vires* decisions, of His Majesty (see *Anisminic Ltd. v. Foreign Compensation Commission)* and here clearly His Majesty's decision was *ultra vires*, and therefore the Court is free to order the release of the appellants.

I would therefore hold that the respondents also fail on this ground.

Finally, the learned State Legal Adviser submits that even if the Court holds that the matter is justiciable, the Court should not entertain the application in view of the circumstances of the case that the respondents have acted in accordance with the law. For myself, I must again say that it is still premature at this stage for the respondents to embark upon this argument, what the Court is called upon to decide now is whether, in the circumstances, the order of *certiorari* is issuable and not that the said order be issued which will have to be decided upon a consideration of all the grounds and merits of the substantive motion.

Accordingly, I dismiss the respondents' application with costs.

Also found at [1987] 1 CLJ 73